SUPREME COURT, U. S.

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MICHAEL RODAK

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-274

MILTON PARNESS and BARBARA PARNESS

Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Government's Brief in Opposition, by the very depth of its discussion of the merits of the three major issues in this case, confirms the importance and uniqueness of those issues. At the same time, the Government's Brief scarcely mentions or addresses itself to the reasons advanced in the Petition as to the appropriateness of granting certiorari. It is that failure that inspires this Reply Brief.

I

The petitioner Milton Parness, aged 56, faces the next 10 years of his life in prison, and must pay fines totalling $55,000. That is what is at stake for him in seeking review of the constitutional and statutory issues that the Government seemingly concedes are both important and unique.[1]

It is intolerable to suggest, as does the Government (Opp. Br. 8, n. 6), that certiorari should be denied because, by parsing the prison terms and fines received on the four counts and thereby eliminating the concurrent 10-year prison term received on each count, only $25,000 in fines can be ascribed to Count One (the Sec. 1962(b) charge). A $25,000 fine in any event is sufficiently prejudicial to support a grant of certiorari. But since Count One incorporated *in haec verba* Counts Four, Five and Six, making the latter three counts somewhat superfluous, it is fair to ascribe to Count One the whole thrust of the 10-year prison term. Particularly is that fair in the context of this case, where the conceded failure of direct proof that any money had been stolen or converted (see Petition, pp. 31-35) undercuts the constitutional validity of the convictions on all counts.

Indeed, under the Government's reading of Sec. 1962(b), set forth at Op. Br. 12-17, Count One properly charged a single, over-all scheme to defraud, of which the acts

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[1] Any violation of Title IX provisions, including Sec. 1962(b), can lead to imprisonment for 20 years, a fine of $25,000, or both, plus forfeiture of any interest the defendant has acquired or maintained. Such offenses carry the most severe maximum penalty authorized in Title 18, U.S.C., except for homicide offenses.

charged in Counts Four, Five and Six were mere elements. It seems unlikely that 10-year maximum prison terms would have been imposed on the three Sec. 2314 counts (Counts Four, Five and Six) had they not been incorporated as elements of the Count One scheme.

Equally intolerable is the Government's suggestion (Opp. Br. 7-8) that certiorari should be denied "to allow other district courts and courts of appeals to consider the issues" prior to this Court's attempt to resolve the unique and important questions at issue. That argument overlooks the many instances where the very uniqueness of important issues has been central to the grant of certiorari, without awaiting further litigation in the lower courts.[2]

The Second Circuit, in this case, has fully delineated the constitutional and statutory problems and, unless reviewed now by this Court, that Second Circuit opinion will likely influence and dominate all further prosecutions of this nature. Right or wrong, that decision is fully ripe for review. Were certiorari now to be denied and were some court later to determine that petitioner's position on the issues was correct, he would be irreparably injured. By the time such conflict of decision could arise, Milton Parness will have served all or a substantial part of his prison sentence — for which there would be no redress.

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[2] See, e.g., *United States v. Kahn*, 415 U.S. 143, 150 (1974), where "We granted the Government's petition for certiorari . . . in order to resolve a seemingly important issue involving the construction of this relatively new federal statute." And in *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964), certiorari was granted because the question there was "an important one of first impression under the LMRDA."

Now is thus the time to review the constitutional and statutory issues at stake, both as a matter of fairness to this petitioner and as a means of providing needed guidelines to "other district courts and courts of appeals" that will face these issues in the future. The problems arising from this complex new statute are numerous and difficult. See Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 Yale L. J. 1491 (1974). The time to deal with the problems refined by the Second Circuit has arrived.

II

The Government (Opp. Br. 8-12) discusses at some length "the merits of petitioners' arguments" concerning the Second Circuit's approval of giving extraterritorial scope to Sec. 1962(b) of the Organized Crime Control Act. But the "merits" of such arguments are not particularly relevant to the grant of certiorari. What the Government fails to see or to answer are petitioners' claims that it is important and appropriate that this Court now resolve "the merits" of this statutory problem.

Just a short while ago, on December 17, 1974, this Court rendered its decision in No. 73-748, *American Radio Assn. v. Mobile Steamship Assn.*, (43 Law Week 4068), another case arising in the context of the Labor Act. The Court there applied and reaffirmed its now settled rule that the Labor Act is not to be given extraterritorial scope in the absence of some clear and affirmative expression of Congressional intent to do so. That decision adds strength to the certiorari problem in this case — i.e., should

that rule of construction, used so frequently in the Labor Act and other civil situations,[3] also be applied in construing the reach of a criminal statute?

The *American Radio Assn.* decision further operates to dilute the Government's contention (Opp. Br. 11-12) that only the potential of serious international disturbance could make applicable the rule of construction followed in the Labor Act cases. As noted at page 7 of the slip opinion (43 Law Week at 4070), this Court has yet "to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." It would thus remain an open question as to how much potential interference in foreign matters is necessary before the statutory construction rule could become applicable in non-maritime or non-Labor Act situations.

Indeed, it is an open question, particularly in the criminal law area, whether any demonstrable international complications are the *sine qua non* of the rule of construction in issue. What we are dealing with here is the problem of the proof necessary to overcome the presumption

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[3] The Government wrongly assumes that this principle of construction has been applied only in maritime situations within the supposed ambit of the Labor Act. But as demonstrated in the Petition (p. 24, n. 8), the rule has also been applied in determining the effect of the Labor Act on World Bank operations and the effect of Sec. 10(b) of the Securities Exchange Act of 1934 on extraterritorial conduct in the securities field.

But apparently no court has assessed the applicability of this rule in the construction of criminal statutes. Such statutes historically have been given narrow constructions, and the rule here involved would be consistent with that principle of narrow construction.

that "All legislation is prima facie territorial." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). See also *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972), noting that "Our patent system makes no claim to extraterritorial effect" and that the patent laws "do not, and were not intended to, operate beyond the limits of the United States."

Does not the same presumption apply to the scope of federal criminal statutes? And what degree of Congressional intent is necessary to justify extraterritorial application of criminal statutes? Is a potential foreign repercussion or retaliation really necessary before this rule of construction becomes applicable? What role does American involvement in a foreign transaction play in the application of this rule?[4]

These are questions that need and deserve exploration in this case.

III

The Government's discussion (Opp. Br. 12-17) of the "merits" of the claim that Sec. 1962(b) is unconstitutionally vague serves mainly to augment the substantiality and hence the reviewability of that claim. In those few pages, the Government has succeeded in rewriting Sec. 1962(b) and thereby adding to the cloud of vagueness obscuring this statute.

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[4] The Government's assertion (Opp. Br. 11) that "American financial sources had loaned some two million dollars" to Hotel Corp. in the Netherlands Antilles is incorrect. Hotel Corp. was financed by loans of $2,500,000 each from the Bank of Nova Scotia and the Antillean Government, a fact which underscores the foreign nature of the operation.

The Government's reading of Sec. 1962(b) is significantly different from that given by the Second Circuit (see Pet. 19a-21a), and indeed quite different from the manner in which the indictment outlined the Sec. 1962(b) offense (see Pet. 11-13). In essence, the Government now says that Sec. 1962(b) encompasses what it calls (Op. Br. 15) "the situation in which two or more indictable acts constitute a single scheme." It would thus collapse the Sec. 2314 predicate offenses (the so-called "pattern of racketeering activity") into the Sec. 1962(b) corporate acquisition offense. The predicate offenses and the acquisition offense are viewed as elements of a single scheme to defraud, premised on the same set of operative facts.[5]

By thus superimposing on Sec. 1962(b) an over-all scheme to defraud, a concept not mentioned in Sec. 1962(b), the Government would effectively eliminate the separatedness implicit in the predicate pattern of Section 2314 violations, and would effectively lift any constitutional requirement of notice preceding the final step in the scheme to defraud — the use of illegitimate funds to make what would otherwise be a legitimate investment. The predicate Sec. 2314 crimes and the prime Sec. 1962(b) investment crime

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[5] Sec. 1962(b)'s reference to a predicate "pattern of racketeering activity," a reference that also appears in Sec. 1962(a), may well involve the only true predicate crime situation in Title 18. Perhaps the closest analogue is the "habitual offender" scheme common in state criminal legislation. The form of that scheme is such that if one commits and is convicted of three crimes, then upon his third or next conviction additional sanctions can be imposed. Central to that statutory scheme is that the three predicate crimes must be distinct and must have resulted in convictions. It is not enough that there be three indictable offenses ascribable to a single scheme to defraud, convictions for which are had at a single consolidated trial.

would operate reflexively on each other. We are left, in short, with a statute that says, "One is guilty of the prime crime because one is guilty of the scheme that involved both the predicate crimes and the prime crime, and one is guilty of the predicate crimes because such guilt can be inferred from the guilt as to the over-all scheme to defraud."

The Government's position is more than a distortion of the words of Sec. 1962(b). It also leaves the accused bewildered as to what, precisely, he has done wrong, and how he should defend. And the constitutional vagueness problems become all the more significant for review purposes. Under the Government's view of the statute, what does the "pattern of racketeering activity" mean to an individual of reasonable intelligence? What does "indictable" mean? What notice does the individual receive that the investment he is about to make may be considered illegitimate under Sec. 1962(b)?

IV

It is not surprising that the vague provisions of Sec. 1962(b) have led to acquiescence in the vague proof offered by the Government. The latest reflection of that acquiescence is found in the Solicitor General's brief (Opp. Br. 17-21), which makes no claim that there was any direct proof of the *corpus delicti* — that any marker money was missing, stolen, withheld or unreported.

The brief simply repeats the constitutionally inadequate assertion that "Parness was in a position to have collected and withheld substantial amounts of marker receipts" and that the jury could draw "the entirely reasonable inference from the evidence that this is in fact what happened"

(Opp. Br. 18).[6] Significantly, the Solicitor General does not confront or answer petitioners' claim that the constitutional due process implications of such totally inadequate proof make certiorari most appropriate in this case. Can the jury be allowed to infer that a crime was committed simply by reference to circumstantial evidence and to the failure of the defendants to take the stand?

The Government's final argument (Opp. Br. 20-21) concerning the fatal variance between the indictment and the proof of the conversions is entirely misplaced. The trial judge, it is true, was referring to the "critical" factor under the Sec. 1962(b) count, that there be a "scheme or plan to defraud," when he instructed the jury that the Government's theory was that Parness either withheld marker collections or, "if he did remit them, Mr. Goberman was denied their use." But this vital switch in the Government's theory necessarily had its impact on the allegations of the Sec. 2314 crimes, for at least two reasons:

(1) Under the theory of the indictment, the Sec. 2314 predicate crimes were incorporated in Count One, the Sec. 1962(b) count, as integral parts of the "pattern of racketeering activity."

(2) Under the Government's new theory of the statute (Opp. Br. 12-17), the Sec. 2314 predicate crimes are but

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[6] The Government errs in asserting (Opp. Br. 18) that the I.R.S. seized $60,000 in cash marker collections "destined for Parness." Goberman himself testified that he – not Parness – was to have been the recipient of this $60,000, which was owed Hotel Corp. by an individual named Norber. See App. 476a, 477a, 505a, 506a.

elements of an over-all scheme or plan to defraud, as encompassed by Sec. 1962(b).

Thus, by this confusing intermingling of the predicate and main crimes, the prosecutor and the judge were able to implant in the jury's mind that the Sec. 2314 elements of the Sec. 1962(b) pattern or scheme to defraud could be proved by a showing that Parness either withheld marker collections or later denied Goberman the use of the money that was collected and remitted.

The latter theory was contrary to the indictment's charge, in all counts, that the collections were withheld and utilized on February 4 and 9, 1971, to execute the loan to Goberman. The alleged *later* withholding of the use of collected moneys simply could not have been the means of finalizing the loan on February 4 and 9. And in that critical inconsistency lies the imperissible variance.

The certiorari importance of that variance, as spelled out in the Petition (pp. 34-35), has not been denied by the Government.

CONCLUSION

This is not an easy case, primarily because the statutory provisions are ambiguously and inartistically drawn. But the very difficulties that adhere to the statutory language give rise to the significant statutory and constitutional issues here at stake. The statute seems to give very little notice to those accused under it. Judges and juries are confused by it. Even appellate courts and the Government defenders seem at odds over how to read and interpret the statute in this instance.

The grant of certiorari is the only way to strip the confusion away from this statute and to insure that petitioners have received fair and equal treatment under the federal criminal system.

Respectfully submitted,

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